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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. ERIC CARDENAS, Defendant and Appellant.	B234825 (Los Angeles County Super. Ct. No. NA089015)

APPEAL from the judgment of the Superior Court of Los Angeles County. Judith L. Meyer, Judge. Affirmed as modified.

Ronald L. Brown, Public Defender, Albert J. Menaster, Elizabeth Warner-Sterkenburg, Karen Nash and John H. Scott, Deputy Public Defenders, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Lawrence M. Daniels and Allison H. Chung, Deputy Attorneys General, for Plaintiff and Respondent.

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Defendant and appellant Eric Cardenas was sentenced to five years in state prison following his conviction on a plea of no contest to one count of willful infliction of corporal injury on a spouse in violation of Penal Code section 273.5, subdivision (a). Defendant's sole contention on appeal is that the mandatory Judicial Council form protective order issued at sentencing must be reversed and stricken as it was issued in excess of the court's jurisdiction and without supporting evidence. We strike two provisions of the protective order, and otherwise affirm.

BACKGROUND

Defendant was charged by amended information with one count of willful infliction of corporal injury on a spouse (Pen. Code, § 273.5, subd. (a)),[1] and one count of attempting to dissuade a witness (§ 136.1, subd. (a)(2)) arising from an incident on May 19, 2011, in which defendant, while intoxicated, punched his wife (H.R.), breaking her jaw. It was also specially alleged with respect to count 1 that defendant inflicted great bodily injury within the meaning of section 12022.7, subdivision (e). At defendant's arraignment, the court granted the prosecution's request for a criminal protective order, pending trial, pursuant to section 136.2

After initially entering a plea of not guilty, defendant agreed to plead no contest to count 1 (willful infliction of corporal injury on spouse), as well as the great bodily injury enhancement. After the requisite admonitions and waivers were stated on the record, the court accepted defendant's plea and entered a conviction against defendant on count 1. Pursuant to the agreement, count 2 for attempting to dissuade a witness was dismissed.

Consistent with the terms of the plea agreement, the court imposed a five-year state prison term, consisting of the low term of two years on count 1, plus three years for the enhancement. Defendant was awarded 23 days of custody credits and ordered to pay various fines and restitution.

The prosecution then requested the court to impose a 10-year protective order in favor of defendant's wife H.R., as well as the three children. Before ruling on the

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[1] All further statutory references are to the Penal Code.

request, the court allowed defendant's wife to make a statement to the court. H.R. asked the court to modify the prosecutor's request for a 10-year protective order because she and the children did not fear defendant. She explained that she believed defendant made a horrible mistake, but that he is not a bad man, just a man who has a problem with alcohol and was under severe financial pressures. H.R. stated she wanted to be able to write to defendant, have phone calls, and visit him in prison if she wanted to do so.

Defense counsel echoed H.R.'s statement, agreeing that the incident was horrible, but arguing it was an isolated act of violence by defendant. Defense counsel argued that peaceful contact by the family while defendant was in prison should be allowed, and that contact, particularly with the children, should not be precluded but addressed, if at all, by an appropriate family law order. No other specific objections were raised by defense counsel. The prosecutor reiterated her opposition to anything other than a "full" protective order.

The court issued a five-year "Criminal Protective Order -- Domestic Violence" on the mandatory Judicial Council form CR-160, specifying H.R. and the three children as the protected persons. This appeal followed. We granted defendant's motion to augment the record to include documents from a defense motion denied by the trial court to stay enforcement of the protective order pending resolution of this appeal.

DISCUSSION

Defendant's primary contention is that the court lacked jurisdiction to issue a protective order at the time of sentencing pursuant to section 136.2. Defendant is correct that, before January 2012, a protective order under section 136.2 (also referred to as a "stay away order") could only be issued as a *prejudgment* order during the pendency of criminal proceedings and not at the time of sentencing to state prison. (*People v. Ponce* (2009) 173 Cal.App.4th 378, 382 (*Ponce*).)[2]

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[2] We note for the record that the Legislature has amended section 136.2, effective January 1, 2012, adding new subsection (i) which largely conforms section 136.2 with the language of section 273.5 and allows for imposition of protective orders at the time of sentencing. (Stats. 2011, ch. 155, § 1 (Sen. Bill No. 723).)

The only basis for defendant's argument that the court issued the protective order at sentencing pursuant to section 136.2 and not pursuant to section 273.5 is that the "modification" box is checked on the face sheet of the order. Defendant contends the protective order must have been a modification of the protective order entered at his arraignment pursuant to section 136.2, even though the Judicial Council form protective order entered by the court states on its face it is authorized by sections 136.2 *and* 273.5 (and other statutes not involved here). The argument has no basis.

"The general rule is that a trial court is presumed to have been aware of and followed the applicable law. (*Howard v. Thrifty Drug & Discount Stores* (1995) 10 Cal.4th 424, 443 ['[A]n appellate court must presume that the decision of the trial court is correct.']; *Corenevsky v. Superior Court* (1984) 36 Cal.3d 307, 321 ['An order is presumed correct; all intendments are indulged in to support it on matters as to which the record is silent, and error must be affirmatively shown.']; [citations].)" (*People v. Mosley* (1997) 53 Cal.App.4th 489, 496 (*Mosley*); see also Cal. Rules of Court, rule 4.409 [sentencing criteria deemed considered "unless the record affirmatively reflects otherwise"].)

The record here does not affirmatively show the trial court was relying on section 136.2 in imposing the five-year protective order as part of defendant's sentence. Defendant was convicted pursuant to a plea of no contest to a violation of section 273.5, subdivision (a). Subdivision (i) of section 273.5 provides: "Upon conviction under subdivision (a), the sentencing court shall also consider issuing an order restraining the defendant from any contact with the victim, which may be valid for up to 10 years, as determined by the court. It is the intent of the Legislature that the length of any restraining order be based upon the seriousness of the facts before the court, the probability of future violations, and the safety of the victim and his or her immediate family. This protective order may be issued by the court whether the defendant is sentenced to state prison, county jail, or if imposition of sentence is suspended and the defendant is placed on probation."

From the outset of the sentencing hearing and the prosecutor's statement that a 10-year protective order was being requested (clearly raising the issue of a section 273.5 order), the court and the parties *never* mentioned section 136.2. The court is presumed to have known the applicable law and that in light of the conviction of defendant under section 273.5, the court was *required* to consider imposition of a protective order as a part of the sentence. (§ 273.5, subd. (i) ["sentencing court shall also consider issuing an order restraining the defendant from any contact with the victim"].) Absent an affirmative showing by defendant that the court actually applied the incorrect law in imposing sentence, no basis for reversal is established. (*Mosley*, *supra*, 53 Cal.App.4th at p. 496.)

Ponce is distinguishable. There, the court found the stay away order issued at the time of sentencing was erroneously issued under section 136.2. (*Ponce*, *supra*, 173 Cal.App.4th at p. 382.) The protective order was issued on the former version of Judicial Council form CR-160, which was only applicable to protective orders imposed under section 136.2 or as a condition of probation, but the trial court did not check either box on the form. Because the defendant was not placed on probation but was sentenced to state prison, the *Ponce* court reasoned that the protective order necessarily must have issued under section 136.2. (*Ponce*, at p. 382.) Given that section 136.2 protective orders could not be imposed as part of a state prison sentence, the *Ponce* court held the section 136.2 protective order was not authorized and struck it from the defendant's sentence. (*Ponce*, at pp. 382-383.)

Judicial Council form CR-160 was subsequently modified and, as of January 1, 2009, CR-160 expressly pertains to protective orders issued at the time of sentencing pursuant to section 273.5. The protective order imposed by the trial court at sentencing on June 8, 2011, was completed on the current version of form CR-160. Given the balance of the record, the mere fact that the box for "modification" was checked on the face sheet of the form is not, by itself, evidence the court issued the protective order under section 136.2. Defendant offers no other argument supporting his contention the protective order was an invalid section 136.2 order imposed at sentencing.

Defendant also contends the protective order is not supported by substantial evidence. "A grant or denial of injunctive relief is generally reviewed for abuse of discretion." (*Gonzalez v. Munoz* (2007) 156 Cal.App.4th 413, 420.) The trial court had broad discretion in imposing sentence, and specifically to determine the appropriate scope of a protective order pursuant to section 273.5. (§ 273.5, subd. (i); see also 6 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Criminal Judgment, § 155, p. 183.) Given the nature of the charge and the severe injury suffered by the victim, defendant has failed to show the court's decision to impose a five-year protective order in favor of H.R. was arbitrary or capricious.

However, defendant is correct there is no evidence in the record supporting the inclusion of the children in the scope of the protective order.[3] " '[J]udicial discretion to grant or deny an application for a protective order is not unfettered. The scope of discretion always resides in the particular law being applied by the court, i.e., in the " 'legal principles governing the subject of [the] action . . . .' " ' [Citations.]" (*S.M. v. E.P.* (2010) 184 Cal.App.4th 1249, 1264-1265; accord, *Nakamura v. Parker* (2007) 156 Cal.App.4th 327, 337.) The plain language of section 273.5 provides for a protective order to issue *only in favor of the victim* of the domestic violence. The record shows only that defendant's wife was the victim of a single assault. The three children were not alleged to be victims of the assault, and their names must be stricken from the order. The court's order that defendant "may have peaceful contact with" the children pursuant to a subsequent order of the family law, juvenile or probate court "only after [such] order has

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[3] We are not persuaded by respondent's contention that defendant forfeited any right to challenge the inclusion of the children in the protective order simply because counsel for defendant advised the court, at the hearing on defendant's motion to stay enforcement of the protective order pending appeal, that she was not authorized to accept personal service of any order modifying the stay away order.

been shown to criminal court" is similarly without statutory authority and also must be stricken from the order.[4]

DISPOSITION

The names of the children M.C., A.M., and E.M. are stricken from paragraph 4 of the protective order. The language "only after order has been shown to criminal court" is stricken from paragraph 14 of the protective order. In all other respects, the judgment of conviction and sentence are affirmed.

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GRIMES, J.

WE CONCUR:

RUBIN, Acting P. J.

FLIER, J.

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[4] The court's admonition to the victim to not visit defendant in prison may have been well-intended, but it is also without authority because the court had no authority to restrain the victim. The protective order prohibits defendant from having any contact with the victim and is not limited to contact *initiated* by defendant.